92-574

No.

Supreme Court, U.S.
FILED
SEP 29 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

RICHARD TOBIAS,

Petitioner,

vs.

THE UNIVERSITY OF TEXAS AT ARLINGTON; W. H. NEDDERMAN; MYRNA PICKARD; AND ELAINE GEBHARDT,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Texas and/or the Court of Appeals for the Second Supreme Judicial Distict of Texas

PETITION FOR WRIT OF CERTIORARI

DOUGLAS R. LARSON
Attorney for Petitioner
3939 Highway 80, Suite 100
Mesquite, Texas 75150
(214) 686-6441
(214) 686-5894 (Facsimile)

OUESTIONS PRESENTED FOR REVIEW

1. Whether the fair and impartial award of a student's grade, based solely on merit, is an interest protected by the Due Process Clause of Fourteenth Amendment of the United States Constitution.

2. Whether a student is entitled to a meaningful hearing regarding his grades when there is evidence that the professor, in assessing the student's performance and assigning the grade, acted in a biased and capricious manner.

LIST OF INTERESTED PARTIES

Parties Below:

a. Richard Tobias

b The University of Texas at Arlington

c. W.H. Nedderman

d. Myrna Pickard

e. Elaine Gebhardt

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Interested Parties ii

Table of Contents iii

Table of Citations iv

Opinions Below 2

Statement of Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

A. Factual Background 3

B. Course of Proceedings and Disposition Below 6

Reasons for Granting the Writ 7

I. The Fair And Impartial Award Of A Student's Grade, Based Solely On Merit, Is An Interest Protected By The Due Process Clause Of The Fourteenth Amendment Of The United States Constitution... 8

A. A student grade, when necessary for a degree and state license, is a right protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. 8

Contents

Page

B. A contract between a university and a student creates an important right protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. 14

II. A Student Is Entitled To A Meaningful Hearing Regarding His Grades When There Is Evidence That The Professor, In Assessing The Student's Performance And Assigning The Grade, Acted In A Biased And Capricious Manner. 18

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

Abeyta v. Town of Tacos, 499 F.2d 323 (10th Cir. 1974) 10

Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586 (1971) 11

Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976) 10

Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978) 21, 22

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)....10, 15, 19, 20

Burks v. Perk, 470 F.2d 163 (6th Cir. 1972), cert. denied, 412 U.S. 905 (1973) 10

Contents

Page

Corso v. Creighton University, 731 F.2d 529 (8th Cir. 1984) 15

Eiland v. Wolf, 764 S.W.2d 827 (C.A. Houston 1989) 16

Foley v. Benedict, 55 S.W.2d 805 (Com. of Appeal Sect. A 1932) 17

Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975)..... 11

Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 30 (1978) 8, 11, 12, 21

Harrah Independent School District v. Martin, 440 U.S. 194, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979) 18, 19

Levitt v. University of Texas at El Paso, 759 F.2d 1224 (5th Cir. 1985) 23

Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) 15

Lontine v. Van Cleave, 483 F.2d 966 (10th Cir. 1973) 10

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978) 11

Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473 (1961) 8

Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed. 2d 570 (1972) 15, 19, 20

Contents

Page

Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 106 S. Ct. 507, 88 L.Ed. 2d 523 (1985) 12, 23

Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980) 10

United States v. Classic, 313 U.S. 299, 61 S. Ct. 1031 (1941) 8

University of Houston v. Sabeti, 676 S.W.2d 685 (Tex. App. -Houston [1st Dist.] 1984) 14

University of Texas Health Science Center at Houston, et al. v. Baab, 646 S.W.2d 502 (Tex Civ. App. -Houston 1982) 16

Wells v. Dallas Independent School Dist., 793 F.2d 679 (5th Cir. 1986) 22, 23

White v. Thomas, 600 F.2d 680 (5th Cir. 1981), cert. denied, 455 U.S. 1027, 102 S. Ct. 1731, 72 L. Ed. 2d 148 (1982) 10

Zimmerman v. Spencer, 485 F.2d 176 (5th Cir. 1973) 14

Statutes Cited:

28 U.S.C. § 1257 2

42 U.S.C. § 1983 9

Tex. Educ. Code. Ann. § 54.051 et seq. 12

Contents

Page

Tex. Educ. Code. Ann. § 65.31 12

Tex. Rev. Civ. Stat. Ann. Art. 4518 (Vernon Supp. 1991) 11, 12

United States Constitution Cited:

Fourteenth Amendment .....i, 8, 9, 10, 14, 18, 19, 21

Other Authority Cited:

Texas Constitution, Art. 7, § 1 et seq. 12

Buchter, Contract Law and the Student-University Relationship, 48 Ind. L.J. 253 (1973) 14, 15

APPENDIX

Appendix A — Final Judgment of the 236th Judicial District Court, Tarrant County, Texas Dated July 24, 1990 ..... 1a

Appendix B — Judgment and Opinion of the Court of Appeals for the Second Supreme Judicial District of Texas Dated December 11, 1991 ..... 2a

Appendix C — Denial of Writ of Error to the Supreme Court of Texas Dated July 1, 1992..... 25a

No.

In The

Supreme Court of the United States

October Term, 1992

RICHARD TOBIAS,

Petitioner,

vs.

THE UNIVERSITY OF TEXAS AT ARLINGTON; W.H. NEDDERMAN; MYRNA PICKARD; and ELAINE GEBHARDT,

Respondents.

Petition for Writ of Certiorri to the Supreme Court of Texas and/or the Court of Appeals for the Second Supreme Judicial District of Texas

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE UNITED STATES SUPREME COURT:

Petitioner Richard Tobias respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Second Supreme Judicial District of Texas, affirming a summary judgment granted Respondents by the 236th

Judicial District Court of Texas, where Writ of Error was refused by the Supreme Court of Texas.

OPINIONS BELOW

The July 24, 1990 the Final Judgment of the 236th Judicial District Court, Tarrant County, Texas, granting in its entirety Respondents' (Defendants below) motion for summary judgment, is reprinted as Appendix A, at page 1a. The December 11, 1991 judgment of the Court of Appeals for the Second Supreme Judicial District of Texas affirming the trial court's judgment is reported at 824 S.W.2d 201 (Tex. App.-Fort Worth 1991, writ denied), and is reprinted as Appendix B, at page 2a. The July 1, 1992 Supreme Court of Texas denial of Petitioners Application for Writ of Error is not reported, but is reprinted as Appendix C, at page 25a.

STATEMENT OF JURISDICTION

The final judgment of the Court of Appeals for the Second Supreme Judicial District of Texas was rendered on December 11, 1991 and the Supreme Court of Texas denied Petitioner's Application for Writ of Error and subsequent appeal to that Court on July 1, 1992. This Court has jurisdiction to review the judgment of the Court of Appeals for the Second Supreme Judicial District of Texas pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Fourteenth:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

A. Factual Background

This cause involves Petitioner Richard Tobias' dealings with the University of Texas at Arlington (U.T.A.) and members of the teaching staff (Elaine Gebhardt) and the U.T.A. Administration (W.H. Nedderman, University President and Myrna Pickard, Nursing School Dean). Tobias enrolled as a student at the University of Texas at Arlington in the Spring of 1982 and pursued a bachelor's degree in nursing and continued his studies through the fall semester of 1984. Tobias' grades were either satisfactory or above average at U.T.A. through the fall 1983 semester.

Halfway through the 1984 spring semester, Petitioner began a required course of "O.B. Nursing" in which he received a failing grade. This controversy is concerned with the grade that Tobias received in this course.

O.B. Nursing or Nursing 4541, as it was referred to by the University, is a five (5) semester hour course required for a

bachelor's degree in nursing. The course was taught in conjunction with another course which also produced five (5) semester hours of credit. The first eight (8) weeks of the semester were devoted to one course (Nursing 4531) and the second eight (8) weeks were devoted to Nursing 4541, or O.B. Nursing. The second half of the semester Nursing 4541 was taught by Elaine Gebhardt and her course consumed the second one-half semester or eight (8) weeks. Tobias successfully completed the course taught in the first eight (8) weeks.

The course (Nursing 4541) began in mid-semester, late March, 1984. On April 6, 1984 Tobias missed class due to the fact that he had been arrested for and forced to stand trial for illegal gun possession (Tobias was acquitted). Tobias offered to show Gebhardt a letter from his criminal defense counsel indicating the reason for his absence from class on April 6, 1984. Gebhardt refused to accept this as an excuse for the class absence.

On April 10, 1984 Ms. Gebhardt called Tobias to her office to accuse Tobias of placing an obscene telephone call to her at her home on April 4, 1984. Tobias denied making this call and has consistently and adamantly denied this act since that date. After confronting Tobias with her claim that he had made an obscene telephone call, Gebhardt and Tobias' teacher-student relationship deteriorated. Ultimately Tobias received a failing grade (F) for Gebhardt's course. This grade was based solely on the "subjective" aspects of the course as the Petitioner had successfully achieved a passing mark (76% or a "C") on the objective aspect of Nursing 4541.

After Tobias received the "F" in Nursing 4541, he appealed the grade and the basis for the grade. To achieve this he resorted to and relied on the appeal process contained in the U.T.A. catalogue, which states as follows:

GRIEVANCE RELATED TO GRADES

> In attempting to resolve any student grievance regarding grades, it is the obligation of the student first to make a serious effort to resolve the matter with the individual with whom the grievance originated. Individual course instructors retain primary responsibility for assigning grades. The instructor's judgment is final unless compelling evidence shows discrimination, differential treatment, or procedural irregularities. If evidence warrants appeal, the normal academic channels are these: department chairman or program director, academic dean, Vice-President for Academic Affairs, President. However, before considering a grievance, the department chairman or program director may refer the issue to a departmental or school committee of faculty and students. If the committee cannot reach a solution acceptable to the parties involved, the matter will follow the remaining academic channels.

In accordance with the above, Tobias conferred with Gebhardt, but this was of no avail as she refused to change the grade or to consider that she had done anything improper. During Tobias' conversations with Gebhardt on June 6, 1984 concerning his grade, he asked to review his papers and Gebhardt's required written evaluations but she refused. Tobias has never received any of Gebhardt's required written evaluations.

Later, in the summer of 1984, Tobias met with the Dean of the School of Nursing, Myrna Pickard, to discuss his failing grade of "F". To place the legal connotation of "hearing" on these meetings

in Dean Pickard's office is to stretch the meaning of the word. Tobias was not allowed to present evidence on his behalf nor was he afforded the opportunity to confront Gebhardt as to the basis for her decision regarding Tobias' grade. Dean Pickard was aware of Gebhardt's allegation regarding the "obscene" phone call and refused to take any action to alleviate the problem regarding the failing grade. Tobias then attempted to take up the matter with the president of the University, W.H. Nedderman, but this also resulted in nothing favorable to his cause. Before Tobias went to Nedderman, Dean Pickard threatened Tobias by telling Tobias that if he wanted to be a nurse that he should not appeal to Nedderman. Like Pickard, Nedderman heard no evidence, took no testimony, and did not allow Tobias to confront Gebhardt as to the basis for her decision, but Nedderman did have "*ex parte*" conversations with Dean Pickard in the absence of Tobias. Neither Pickard nor Nedderman reviewed the subjective basis for the grade of "F" or the Petitioner's papers reflecting the Petitioner's clinical work in O.B. Nursing. These papers, according to Gebhardt, establish her basis for the failing grade. Tobias was not permitted to present evidence on his behalf nor was he allowed to confront the evidence against him.

Nedderman's last contact with the Petitioner relative to his "appeal" was on September 6, 1984 when Nedderman met with the Tobias for one hour. The Petitioner needs 16 semester hours to complete the requirements for the Bachelor's Degree in Nursing of which 5 hours are in the field of O.B. Nursing.

B. Course of Proceedings and Disposition Below

The Petitioner, Richard Tobias, originally filed this cause in the 236th Judicial District Court, Tarrant County, Texas on September 4, 1986. Tobias sought injunctive relief and damages Dean Myrna Pickard, and Elaine Gebhardt for matters relating to his grade in a course taught in the U.T.A. School of Nursing. The District Court held a hearing on a temporary injunction submitted

to the District Court on matters filed by all parties and the Respondent's motion for summary judgment. The District Court entered summary judgment for the Respondents on July 24, 1990. *See* Appendix A. On August 20, 1990 the Petitioner sought a new trial. This request was overruled by operation of law and the Petitioner effectuated a timely appeal to the Court of Appeals for the Second Supreme Judicial District of Texas. On December 11, 1991 the Court of Appeals affirmed the judgment of the District Court (Appendix B) and subsequent to that decision Petitioner filed his timely motion for rehearing. The Court of Appeals, on January 15, 1992, denied Petitioner's motion for rehearing.

On February 14, 1992, Petitioner filed his timely Application for Writ of Error to the Supreme Court of Texas. The Supreme Court of Texas then denied Petitioner's Application for Writ of Error on July 1, 1992. *See* Appendix C.

These proceedings were pending in the 236th District Court for almost four (4) years.

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether a student at a state university has been denied a protected right and/or due process when he was denied a meaningful appeal of a failing grade in a course required for graduation and subsequent licensing by the state, when bias against the student appears evident and the arbitrary and capricious conduct of a professor and other university officials is involved. Petitioner believes that his rights to due process were denied both when Respondents denied him the right to a meaningful hearing at a meaningful time during the university's "appeal process". Both "interpretation and application of due process are intensely practical matters and the very nature of due process negates any concept of inflexible procedures

universally applicable to every imaginable situation. The fundamental requisite of due process of law is the opportunity to be heard." *Goss v. Lopez*, 419 U.S. 565, 578-579, 95 S. Ct. 729, 738, 42 L. Ed. 2d 30 (1978). U.T.A.'s appeal process summarily decides a party's cause without allowing the student a right to be heard, thus denying Petitioner's right of due process.

As this Court states in *United States v. Classic*, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043 (1941); "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961), and its progeny make clear that any state official acting under color of law that commits an act resulting in a constitutional violation is answerable in court for his wrong doing. Therefore, Petitioner believes the refusal by the trial court and the courts of appeal to apply meaningful due process standards to this case, requires reversal.

I.

THE FAIR AND IMPARTIAL AWARD OF A STUDENT'S GRADE, BASED SOLELY ON MERIT, IS AN INTEREST PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. A student grade, when necessary for a degree and state license, is a right protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The State of Texas requires a person to successfully complete a college or university's nursing program to hold a degree in nursing and to become licensed by the state as a registered nurse. Petitioner as a student at the University of Texas at Arlington is

required to complete "O.B. Nursing" in order to satisfy the requirements of the degree program in nursing at the U.T.A. After Petitioner had received a failing grade from Gebhardt in "O.B. Nursing" and in accordance with University regulations, Petitioner sought first to appeal this grade through his professor in that course (Gebhardt), then to the Dean of the School of Nursing, and finally the President of the University of Texas at Arlington. None of those individuals gave Petitioner a meaningful hearing nor did they allow the Petitioner to be present during their purported review, nor did they allow Petitioner to present evidence to support his position or to refute the allegations of the professor who gave him that failing grade. Petitioner then sought redress in the courts, where this case was pending on the trial court's docket from September 4, 1986 until that court granted Respondents' motion for summary judgment on July 24, 1990. In effect the trial court said that there was no constitutionally protected interest in the fair award of a grade and refused to apply "fair hearing" criteria.

The question presented is whether a student's grade is considered one of those rights protected by the Fourteenth Amendment to the Constitution and is actionable in court (42 U.S.C. § 1983).

Because of U.T.A.'s policy of not allowing a person to retake a course that has been failed twice and not allowing a credit for that course to transfer into U.T.A. from another institution, Petitioner is no longer eligible to earn a nursing degree at U.T.A. A person who is not eligible to complete the degree program at one university is not eligible to transfer to the professional nursing program at another university. Therefore, Respondents' acts, if determined to be arbitrary, capricious and unjustified will have not only denied Petitioner a grade, but instead will have denied Petitioner his opportunity to pursue a career and a degree as a registered nurse, without essentially beginning again in his nursing education.

Federal Courts have found that a state's law may create a protected interest, protected by the due process clause of the Fourteenth Amendment, regardless of whether the state considers the interest protected. In *Thompson v. Bass*, 616 F.2d 1259 (5th Cir. 1980), the United States Court of Appeals for the Fifth Circuit held that an Alabama state employee had a protected property interest in spite of a holding by the Alabama Supreme Court that public employment is not property. The Fifth Circuit agreed that an employee at will does not have a protected property interest, but it did hold that an employee who may be dismissed only for cause is entitled to procedural due process safeguards. Although a court may be bound by state law defining an employment interest, the federal courts have indicated that they are not obligated to follow a state court decision purporting "to determine whether the interest created by state law is protected by the federal Constitution. *Thompson v. Bass*, *supra*, note 24, 616 F.2d at 1265. *See also, White v. Thomas*, 600 F.2d 680, 684 (5th Cir. 1981), *cert. denied*, 455 U.S. 1027, 102 S. Ct. 1731, 72 L. Ed. 2d 148 (1982), where the court stated "[T]o determine whether there has been a denial of due process, the rights given by state law are then weighed on federal scales to determine whether they amount to 'property' in the constitutional sense."

In *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976), this Court firmly established the principle that state law determines the existence of a property interest subject to the procedural due process safeguards of the Fourteenth Amendment. Even though there is no presumption that state law creates a property interest, *Lontine v. Van Cleave*, 483 F.2d 966 (10th Cir. 1973), *Burks v. Perk*, 470 F.2d 163 (6th Cir. 1972), *cert. denied*, 412 U.S. 905 (1973), when a property interest does exist, procedural safeguards automatically attach, *Board of Regents v. Roth, supra*, note 8; *Abeyta v. Town of Tacos*, 499 F.2d 323, 327 (10th Cir. 1974).

This Court has previously recognized that "property" includes

more than just actual ownership of realty, chattels or money. It includes "interests already acquired in specific benefits". However, there must be more than a mere abstract need or desire for, or unilateral expectation of, the benefit. The United States Constitution does not create property interests; there must be a legitimate claim to an existing interest already derived from state or federal law. Thus, protected interests are far ranging and include such things as a protected interest in public education when the state places educational requirements on its citizens, *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); in retention of driver's license under the prevailing statutory standards, *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586 (1971); and in having continued utility service where state law permits a municipal utility company to terminate service only "for cause", *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978). Here Texas statute requires that a person meet certain requirements, including education, in order to become licensed as a registered nurse. Tex. Rev. Civ. Stat. Ann. Art. 4518 (Vernon Supp. 1991). Considering prior decisions of this Court regarding protected rights, the state's licensing requirements here most surely provides Petitioner a protected right in his nursing education.

In *Gaspar v. Bruton*, 513 F.2d 843 (10th Cir. 1975) the Tenth Circuit addressed a similar situation as the one presented here with the exception that the plaintiff in that action was found to have been afforded adequate hearings, presentation of evidence and confrontation with her accusers, where Tobias was not. That court relied on the guidance provided in *Goss* to find that a nursing student had a property right resulting from not only a legitimate entitlement in public education as found in *Goss*, but also from the fact that Gaspar had paid a specific and separate fee for enrollment and attendance at the school.

In establishing that a student has a property right in his public

education, this Court found in *Goss v. Lopez* that:

> [a]mong other things, the State is constrained to recognize a students legitimate entitlement to public education as a *property interest* which is protected by the Due Process Clause which may not be taken away for mis-conduct without adherence to the minimum procedures required by the clause.

(Emphasis supplied). *Goss* at 419 U.S. 574, 95 S. Ct. 736.

A protected property interest is also found to exist in the Laws of the State of Texas. The Texas Constitution, Art. 7, § 1 *et seq.* provides for a system of public education for the citizens of the state. Pursuant thereto, the Texas Legislature has created a protected property interest wherein a student at a state university is required to pay tuition and fees, Tex. Educ. Code Ann. § 54.051 *et seq.*; the State Board of Education must provide for degrees, Tex. Educ. Code Ann. § 65.31; and where a person seeking to practice as a nurse must meet certain minimum educational and licensing requirements, Tex. Rev. Civ. Stat. Ann. Art. 4518.

The issues in this cause are ultimately controlled by this Court's decision in *Regents of Univ. of Michigan*, 474 U.S. 241, 106 S. Ct. 507, 88 L. Ed. 523 (1985). In that case the Court assumed that the student had a protected interest in his grade. The Court then determined that the fact question to be decided by the finder of fact is whether the university acted arbitrarily in refusing to change the grade and thus denying a fundamental right. Here the evidence indicates that the Respondents did not follow the University's grievance procedure and the following facts indicate arbitrary criteria was applied to the challenge by Petitioner to his failing grade.

1. Respondent Gebhardt falsely accused the Petitioner of making an obscene telephone call.

2. Tobias denied making any such call.

3. Gebhardt told Tobias that she would always believe that the Petitioner made the call.

4. The course taught by Gebhardt was graded and taught in two parts, one objective, one subjective.

5. Tobias passed the objective part with a 76%. Tobias was failed by Gebhardt only in the subjective aspect of the course.

(Concededly, review of this action is very difficult, but when the taint of possible retribution over the belief that an obscene call was made demands that persons reviewing this possible conduct do more than merely meet and discuss the matter with Gebhardt outside the Petitioner's presence and then with the Petitioner.)

6. The university's catalogue requires a grievance procedure wherein a meaningful hearing be held to determine whether or not compelling evidence that discrimination, differential treatment or procedural irregularities has occurred. Nothing approaching a "hearing" has ever occurred.

7. Because a review by a third person of Gebhardt's subjective grade would require personal observation of the student's ability to evaluate a patient in a clinical setting, it is necessary that a "hearing" over this issue be more than a "meeting" with the Petitioner. No attempt, either in the presence of the Petitioner or outside his presence, was made by either Dean Pickard or President Nedderman to actually review the criteria used by Gebhardt in Gebhardt's award of the failing grade to the

Petitioner. Dean Pickard and President Nedderman merely relied on Gebhardt's biased assessment of Petitioner's performance.

8 No sworn testimony or other admissible evidence was taken during the "appeal" process. Petitioner was not afforded the opportunity of cross-examination or any other form of confrontation. In this regard, *see University of Houston v. Sabeti*, 676 S.W. 2d 685 (Tex. App.-Houston [1st Dist.] 1984), wherein a Texas Court indicated that cross-examination is a minimum requirement in the context of a "hearing" in a college setting.

9. The Dean (Pickard), who it is claimed by the Respondents to have reviewed the Petitioner's grade, told the Petitioner that "if you ever want to be a nurse don't appeal this any further." Dean Pickard did not present the grading criteria in any sort of hearing or did she know how to apply the grading criteria to Gebhardt's evaluation of the Petitioner. Therefore, she was totally unable to objectively review Gebhardt's award of the failing grade to Petitioner.

B. A contract between a university and a student creates an important right protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Absence of a formal or contractual provision does not foreclose the existence of a protected interest recognized by the Fourteenth Amendment to the United States Constitution. To determine the nature of a claimed protected interest, all the circumstances surrounding the plaintiff's claims must be examined. Courts have recognized that while a "mere subjective expectancy" does not create a property interest, such an interest may exist by virtue of institutional policies and practices. *Zimmerer v. Spencer*, 485 F.2d 176 (5th Cir. 1973).

An exhaustive study of the relationship between universities and their students was made in the Indiana Law Journal, Buchter, *Contract Law and the Student-University Relationship*, 48 Ind.

L.J. 253 (1973). It was determined after examining numerous state and federal court decisions, that there exists an implied contract between the student and the institution, with certain constitutional protections if the school is public. Contracts between the student and the university have been found by the various state and federal courts to exist as a result of provisions of the university catalogue, the payment of tuition and other fees, and the student's reliance in the payment of fees and successful completion of academics resulting in the university conferring a degree upon the student.

Relevant to Tobias' substantive due process claim is the question of whether his dismissal deprived him of a protected interest in property. *Board of Regents v. Roth,* 408 U.S. 564, 576-578, 92 S. Ct. 2701, 2708-2709, 33 L. Ed. 2d 548 (1972). Protected interests are not created by the United States Constitution, but rather are created and "defined by existing rules or understandings that stem from an independent source such as state law. . ." *Id.* at 408 U.S. 577, 92 S. Ct. 2709. Those rules or understandings may arise by statutory or common law and may be found in the terms of an express or implied contract. *Perry v. Sindermann,* 408 U.S. 593, 601-602, 92 S. Ct. 2694, 2699-2700, 33 L. Ed. 2d 570 (1972). A protected property interest may attach to any rule or understanding that gives rise to an individual entitlement which cannot be removed except for cause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S. Ct. 1148, 1154, 71 L. Ed. 2d 265 (1982). The relationship between a university and a student is ordinarily contractual in nature, and the terms of the contract may be implied from the university catalogue or other statements of academic policy. *Corso v. Creighton University,* 731 F.2d 529 (8th Cir. 1984). Here, U.T.A. promulgated a publication setting forth a grievance procedure for the appeal of a student's allegedly improper grades. This procedure creates an implied expectation in students that they would not be graded arbitrarily or capriciously, thus creating a protected right in non-arbitrary grading.

There are conflicting positions taken by Texas appellate courts as what the legal status is of a student attending a state university *vis a vis* Texas public university's catalog. In the *University of Texas Health Science Center at Houston, et al. v. Baab*, 646 S.W. 2d 502 (Tex. Civ. App.- Houston 1982), the Houston Court of Appeals held that the University of Texas' catalog is a contract. In *Eiland v. Wolf*, 764 S.W. 2d 827 (C.A. Houston 1989), the same Houston Court of Appeals apparently held that the University of Texas catalog is not a contract because of a disclaimer contained in the catalog that states that the catalog is not to be construed as a contract.

Based on the university's positions taken in this cause, the university of Texas at Arlington appears to take a position that because the catalog is not a contract that U.T.A. can arbitrarily and unilaterally determine what provisions in its University catalog can be administratively and/or judicially enforced. What the proper response by Texas courts to this state of affairs has not been fully determined. It is doubtful that a student who enrolls in a four (4) year program at U.T.A. for a Baccalaureate Degree and who successfully completes the U.T.A. catalog requirements within the four (4) years as set out in the catalog cannot be entitled to judicially force the University of Texas to award him a degree, if the University should arbitrarily refuse to give him that degree. In fact, the University of Texas at Arlington's president appears to recognize that U.T.A. has some obligations to enforce its catalogue provisions. In a hearing on this matter U.T.A. President Nedderman testified that the catalog does express rights. Petitioner suggests that the shallow analysis done by the Houston Court of Appeals in *Eiland* is not determinative of a student's rights. Contemporaneous with Texas' creation of colleges and universities, state laws creating the universities also created boards and bodies empowered by law to establish rules and regulations which govern the Texas state supported institutions of higher learning. These rule making powers are now found in the

Education Code. However, even before the codifications now found in the Education Code, these rules making powers existed. This assertion is best evidenced by *Foley v. Benedict*, 55 S.W. 2d 805 (Com. of Appeal Sect. A 1932) wherein it was held that rules promulgated by a university's Board of Regents pursuant to its delegated rule making power have the same force of law as a statute passed by the Legislature. Therefore, if the Board of Regents of the University of Texas promulgates rules and/or regulations governing the enforceability of the University's catalog, the catalog would then have the force of law regardless of its status as a contract. Also of note in *Foley v. Benedict*, the court held that the University's rule making power was not absolute but that the rules it promulgated may not be arbitrary and must be reasonable. These rules in part provide that:

> Sec. 9. *Acquaintance with, Conformity to, Availability and Improvement of Regulations.*
>
> 9.1 It is a specific and important duty of each member of the several teaching staffs to become acquainted with and to conform to all the rules and regulations relating to him and to the proper and orderly discharge of his work that are to be found set forth in both these Regents' Rules and Regulations and the institutional Handbook of Operating Procedures; in "catalogues" announcements of course, and other official publications; in printed or other material regularly prepared for the use of the staff; and in minutes of the faculties.

In light of the fact that the University of Texas, acting pursuant to its legislatively delegated authority, requires the "staff" at the University to conform to the provisions contained in the catalogue

it would appear that provisions requiring that a student be given a hearing regarding his grades are judicially enforceable. Therefore, U.T.A.'s claims that the catalog is not a contract should be of no consequence because the catalogue would be enforceable, nevertheless.

Besides the appeal rights found in the catalogue, it is also significant that other provisions of the catalogue were not complied with in relation to Tobias as well. The catalogue liststhat Nursing 4541 is a course that results in five (5) semester hours of credit and the course should be taught over a sixteen (16) week period. Therefore, it would appear that Nursing 4541 was illegally taught because it was presented over an eight (8) week period rather than sixteen (16) weeks as listed in the catalogue.

This development is significant because the Plaintiff would have been precluded from withdrawing from Nursing 4541 without receiving an "F" when the problems regarding Elaine Gebhardt's false accusations occurred in April, 1984.

II.

A STUDENT IS ENTITLED TO A MEANINGFUL HEARING REGARDING HIS GRADES WHEN THERE IS EVIDENCE THAT THE PROFESSOR, IN ASSESSING THE STUDENT'S PERFORMANCE AND ASSIGNING THE GRADE, ACTED IN A BIASED AND CAPRICIOUS MANNER.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . " The concept of due process of law embodied in the Fourteenth Amendment has both procedural and substantive aspects. *Harrah Independent School District v. Martin,* 440 U.S. 194, 99 S. Ct.

1062, 59 L.Ed.2d 248 (1979). Substantive due process protects a person's life, liberty, and property from deprivation through arbitrary or unreasonable government conduct. Procedural due process provides safeguards governing those proceedings which may result in deprivation by government of a person's life, liberty, or property.

Procedural due process guarantees apply to actions which may deprive a citizen Of a property interest or liberty interest. Basically, procedural due process guaranteed by the Fourteenth Amendment requires that an affected citizen be given notice and hearing prior to being finally divested of a protected property or liberty interest. The Supreme Court in its landmark decisions in the companion cases of *Perry v. Sinderman*, 408 U.S. 592, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), decided the same day in 1972, indicated when procedural due process protections attach.

Roth, a non-tenured teacher, was not rehired after his first academic year at Wisconsin State University-Oshkosh. Under Wisconsin statutes then existing, state university teachers became permanent or tenured employees only upon completion of four years of year-to-year employment. Wisconsin provided tenured teachers entitlement to continued employment "during efficiency and good behavior" and granted them certain procedural safeguards prior to dismissal. Non-tenured teachers, like Roth, were protected only during the terms of their contracts.

Whether the procedural due process guarantees of the Fourteenth Amendment apply in a particular case depends upon the nature *of* the interest involved. To have a protected interest that is subject to procedural due process safeguards, a person must "have a legitimate claim of entitlement to it." A "unilateral expectation is not enough. Property interests are created not by the Constitution

but by "existing rules and understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Roth's property interest in his employment "was created and defined by the terms of this appointment" which expired at the end of one year. *Board of Regents v. Roth*, 92 S. Ct. at 2709, n. 8.

Different facts produced a different result in *Roth's* companion, *Perry v. Sindermann, supra*. Sindermann had been a teacher for ten years in the Texas state college system, including four years at Odessa Junior College where he had been employed under successive one-year contracts. Sindermann openly criticized the college regents during his final year. The regents voted not to reemploy Sindermann for the following academic year and issued a press release accusing him of insubordination. The college gave him no notice of the reasons for its decision, nor did it afford him the opportunity for a hearing. As did Roth, Sindermann brought suit alleging that the college's decision violated his First Amendment free speech rights and that its failure to give notice and opportunity for hearing violated his procedural due process rights under the Fourteenth Amendment. The district court granted summary judgment against Sindermann on the barest of pleadings and affidavits. The Fifth Circuit reversed, and the Supreme Court affirmed the court of Appeals.

The Court held that Sindermann's lack of a contractual or tenure right in continued employment, while not material to his free speech claim, was relevant to, but not dispositive of, his procedural due process case. *Perry v. Sindermann*, 92 S. Ct. at 2698, n. 7. "As in *Roth*, the mere showing that [Sindermann] had not been rehired in one particular job, without more, did not amount to a showing of a loss of liberty. Nor did it amount to a showing of a loss of property." Sindermann alleged, however, that the college had a *de facto* tenure policy, and his allegations were

sufficient to preclude summary judgment.

When a student is found to have a protected right in his public education, the public school cannot summarily decide an issue adversely affecting that student. That protected right in state public education invokes the protections of the due process clause of the Fourteenth Amendment.

> . . . [T]he interpretation and application of the Due Process Clause are intensely practical matters and. . . "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).

Goss at 419 U.S. 578, 95 S.Ct. 738.

Once the student's protected right has been determined, the question remains as to what is required to satisfy the due process provisions of the Fifth and Fourteenth Amendments. In addressing a similar situation, this Court, in *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed.2d 124 (1978), found that there is a distinct difference in the degree of due process to be afforded a student when the issue is dismissal for disciplinary reasons as opposed to dismissal for academic reasons. The Court reasoned that dismissal for disciplinary reasons took on an adversarial character and that due process in that context required enhanced hearings, evidence and confrontation. The Court went on to find in *Horowitz* that when dismissal was for academic reasons, the hearing requirement was not as stringent. In *Horowitz*, the Court warned against judicial intrusion in academic decision

making, *Id.*, at 435 U.S. 92, 948 S. Ct. 956, but at the same time appeared to defer to the earlier rulings of state courts and lower federal courts which had found that the judiciary has no place in deciding academic matters, except when the school's actions were shown to be arbitrary or capricious. When the school's actions in the area of academic issues were found to be arbitrary or capricious, the courts had the authority to enjoin the school from denying that property right absent procedural due process. *See Horowitz*, at 435 U.S. 91, 948 S. Ct. 955-956.

Here, Petitioner alleges that Gebhardt arbitrarily and capriciously evaluated Petitioner's performance in her course and graded his performance based on her bias toward the Petitioner. The Petitioner further alleges that subsequent appeal process resulted in nothing more than a "rubber stamp" of Gebhardt's unfair assessment of Petitioner's performance. Unfortunately, Petitioner's allegations of Gebhardt's conduct were never considered by the trial court in its summary judgment for Respondents. Therefore, whether Gebhardt and the other Respondents acted in an arbitrary and capricious manner, giving rise to Petitioner's right to enhanced due process, would still be left to the province of the finder of fact.

The Fifth Circuit in *Wells v. Dallas Independent School Dist.*, 793 F.2d 679 (5th Cir. 1986) set forth the minimum due process rights in connection with the termination of a property right protected by the Fourteenth Amendment. The person whose protected rights are to be terminated must:

> 1. . . .be advised of the cause of the termination...in sufficient detail to show any error that may exist;
>
> 2. . . .be advised of the names and nature of...the testimony of the witnesses against him;

> 3. . . . be afforded a meaningful opportunity to be heard in his own defense. . . ;
>
> 4. before a tribunal that possesses some expertise and an apparent impartiality toward the charges.

Wells, at 793 F.2d 682; quoting *Levitt v. University of Texas at El Paso*, 759 F.2d 1224, 1228 (5th Cir. 1985).

Petitioner's complaint regarding his failing grade was only summarily reviewed even though the rules/regulations governing the University of Texas at Arlington and the laws of both the State of Texas and the United States require that a person not be denied due process of law when the deprivation of person's protected rights are at issue.

This Court's decision in *Regents of Univ. of Michigan v. Ewing* 474 U.S. 214, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985), provides a guideline for determining issues such as those presented here. The Texas Intermediate Court of Appeals attempted to distinguish *Ewing* from the case at issue here and in doing so quoted certain language from *Ewing:*

> When judges are asked to review the substance of a genuinely academic decision ...they should show great respect not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Ewing, at 474 U.S. 225, 106 S. Ct. 513. That statement illustrates the point Petitioner relied on in his allegation that Respondents did not exercise their professional judgment, but rather arbitrarily denied Petitioner his right to be heard in redress of a grievance

relating to a grade. The trial court is required to determine if Respondents did or did not act in the requisite professional manner. Absent the opportunity to determine such a finding by a trier of fact, Petitioner's constitutional rights have been denied.

CONCLUSION

For the reasons stated, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted, and that the Supreme Court should reverse the judgment of the Court of Appeals for the Second Supreme Judicial District of Texas, Fort Worth, Texas, and reverse the judgment of the 236th District Court of Tarrant County, Texas, rendering judgment for Respondents and remand this cause for consideration in light of the principles set forth herein.

Respectfully submitted,

DOUGLAS R. LARSON

Attorney for Petitioner

APPENDIX A — FINAL JUDGMENT OF THE 236TH JUDICIAL DISTRICT COURT, TARRANT COUNTY, TEXAS DATED JULY 24, 1990

IN THE DISTRICT COURT OF
TARRANT COUNTY, TEXAS
236TH JUDICIAL DISTRICT

NO. 236-98907-86

RICHARD TOBIAS,

Plaintiff,

vs.

THE UNIVERSITY OF TEXAS AT ARLINGTON, W.H. NEDDERMAN, MYRNA PICKARD, AND ELAINE GEBHARDT,

Defendants.

FINAL JUDGMENT

This case was submitted to the Court on both the facts and the law on February 26, 1990. Upon review of all pleadings, depositions, motions, and memorandums of authority the Court finds for the Defendants.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing and that Plaintiff pay the costs of suit.

Signed: July 24, 1990

s/ Albert L. White, Jr.
ALBERT L. WHITE, JR.

APPENDIX B — JUDGMENT AND OPINION OF THE COURT OF APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS DATED DECEMBER 11, 1991

NO. 2-90-233-CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FOR T WORTH

From the 236th District Court

Tarrant County (236-98907-86)

December 11, 1991

Opinion by Justice Lattimore

(NFP)

Richard Tobias

vs.

The University of Texas at Arlington, W.H. Nedderman, Myrna Pickard, and Elaine Gebhardt

JUDGMENT

This Court has considered the record on appeal in this case and is of the opinion that there was no error in the judgment of the

trial court. It is ordered, adjudged and decreed that the judgment of the trial court is affirmed.

Is is further ordered that appellant, Richard Tobias, pay all costs of this appeal, and that said costs be paid from the cash deposit made with the clerk of the trial court, for which let execution issue, and that this decision be cer ified below for observance.

s/ Hal M Lattimore

Appendix B

NO. 2-90-233-CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

RICHARD TOBIAS

APPELLANT

VS.

THE UNIVERSITY OF TEXAS AT ARLINGTON, W.H. NEDDERMAN, MYRNA PICKARD, AND ELAINE GEBHARDT

APPELLEES

FROM THE 236TH DISTRICT COURT OF TARRANT COUNTY

OPINION

This is an appeal from a summary judgment rendered in favor of appellees, defendants below, in a case brought by appellant based on the receipt of a failing grade in a nursing course.

We affirm.

Statement of Facts

Appellant, Richard Tobias, brought this action against the

Appendix B

University of Texas at Arlington ["University"] and the following officials of the school, individually and in their respective official capacities: Dr. W.H. Nedderman, President of the University; Myrna Pickard, Dean of the School of Nursing; and Dr. Elaine Gebhardt, Professor of Nursing. In his original petition, filed September 4, 1986, appellant alleged denial of his due process and equal protection rights under the Texas Constitution and breach of contract. Based on these claims, appellant sought: (1) injunctive relief against all defendants; (2) money damages of at least $100,000 against all defendants; and (3) punitive damages of at least $300,000 against appellee Elaine Gebhardt. In a supplemental petition filed July 3, 1989, appellant alleged denial of his due process and equal protection rights under the United States Constitution. Appellant sought money damages for these alleged wrongs.

Appellees filed an original motion for summary judgment on June 26, 1989, and a supplemental motion for summary judgment on July 13, 1989, on the grounds that: (1) appellees were immune from suit under the doctrine of sovereign immunity; (2) there was no violation of appellant's due process or equal protection rights; (3) the college catalog did not create a contract; and (4) the individual appellees were immune under the doctrine of quasi-judicial liability.

On September 22, 1986, the trial court held a hearing on appellant's request for a temporary injunction. At the close of the hearing, the court denied the temporary injunction. Although there is some confusion as to the exact date, the record indicates that the trial court held a hearing on appellees' motions for summary judgment in 1990. In an order dated July 24, 1990, the trial court rendered judgment to appellees.

Appendix B

The record indicates that appellant enrolled in the University in the Spring of 1982 seeking an undergraduate degree in nursing. As a part of the curriculum for the nursing degree, appellant was required to take Nursing 4541-Nursing During the Childbearing Experience. Appellant enrolled in Nursing 4541 in the Spring of 1984 with Professor Gebhardt. As a part of the clinical aspect of the course, appellant was required to submit a nursing process. Appellant described a nursing process as a "long paper in which you identify a patient's problem and then plan your interventions and set your goals in order to help the patient resolve this problem, and proceed towards a more healthy state."

Dr. Gebhardt stated that she spent a lot of time explaining the process paper requirements to appellant. During the course of the class, she noticed that appellant was able to collect data but was unable to apply problem solving or decision making techniques to the data. Appellant did not have his paper completed when initially due, so Dr. Gebhardt gave appellant additional time within which to complete the assignment. Dr. Gebhardt stated that on the last day the papers were due, appellant came to her office with a stack of copied notes, charts, and medical records. Although these papers represented the data appellant had collected, appellant had failed to complete the nursing process. Dr. Gebhardt stated that appellant handed her the stack of papers and told her he wanted her to do the paper because appellant had already collected the data.

Dr. Gebhardt felt that appellant deserved a failing grade because of his inability to complete the nursing process. Before making a final decision, however, Dr. Gebhardt submitted appellant's work to Susan Baxley for a second opinion. After seeing the grade Susan Baxley assigned the paper, Dr. Gebhardt presented the situation to her supervisor, Dr. Wyers. Dr. Wyers assigned the paper to Dr. Susan Grove for review purposes. Both reviewers recommended that appellant receive a failing grade for his work.

Appendix B

After appellant received a failing grade for Nursing 4541, he availed himself of the University's grade grievance procedures. The University catalog provides that:

> GRIEVANCE RELATED TO GRADES
>
> In attempting to resolve any student grievance regarding grades~ it is the obligation of the student first to make a serious effort to resolve the matter with the individual with whom the grievance originated. Individual course instructors retain primary responsibility for assigning grades. The instructor's judgment is final unless compelling evidence shows discrimination, differential treatment, or procedural irregularities. If evidence warrants rants appeal, the normal academic channels are these: department chairman or program director, academic dean, Vice-President for Academic Affairs, President. However, before considering a grievance, the department chairman or program director may refer the issue to a departmental or school committee of faculty and students. If the committee cannot reach a solution acceptable to the parties involved, the matter will follow the remaining academic channels.

There is nothing in the record to indicate what steps were taken by appellant to resolve this problem with Dr. Gebhardt.

The record does reflect that appellant appealed his failing

grade to Myrna Pickard, Dean of the School of Nursing. Dean Pickard held conferences with appellant and appellant also wrote letters to her. Appellant contended that Dr. Gebhardt failed him because she believed that appellant had made an obscene phone call to her. At the meetings with Dean Pickard, appellant was allowed to explain his side of the situation. Dean Pickard also contacted two students from appellant's clinical group to see if they had noticed any discriminatory treatment of appellant by Dr. Gebhardt. The two students indicated that they had not noticed any such treatment. Dean Pickard also contacted several nurses at the hospital where appellant did his clinical work, and they also stated that appellant received the same treatment as any other student. Finally, Dean Pickard reviewed appellant's work and indicated that she would not have been able to pass a student based on the work she reviewed. In a letter to appellant dated June 20, 1984, Dean Pickard denied appellant's appeal for a change in his grade. She did offer to assist appellant in writing nursing processes.

On July 2, 1984, Dean Pickard denied a subsequent request to reconsider stating that she had reviewed the evaluations of appellant's paper and supported the instructor's decision as to appellant's grade. On July 24, 1984, Dean Pickard denied a request from appellant to take courses out of sequence.

W.A. Baker, Vice President for Academic Affairs, was the next person to review appellant's appeal for a grade change. In a letter dated August 24, 1984, W.A. Baker informed appellant that he had reviewed the materials submitted by appellant and discussed the case with Dean Pickard. W.A. Baker denied appellant's appeal stating that he failed to find any "substantive evidence of discrimination, differential treatment or procedural irregularities." On August 29, 1984, W.A. Baker denied appellant's request to take courses out of sequence.

Appendix B

In a letter dated August 31, 1984, W.H. Nedderman, President of the University, informed appellant that he had reviewed the documentation provided by appellant and had discussed appellant's case with others. Based on this review, appellant's appeal was denied. Following a letter from appellant and a meeting on September 6, 1984, President Nedderman informed appellant, in a letter dated October 5, 1984, that his appeal had been given appropriate attention and he was therefore denying appellant's request to reconsider.

Appellant again enrolled in Nursing 4541 in the fall of 1984 with Susan Baxley as the instructor. Susan Baxley noticed that appellant had some difficulty with patient assessment and carrying out patient care without supervision. Appellant also had difficulty communicating with and supporting patients. Susan Baxley also noticed that appellant had difficulty in completing the nursing process requirement. Although appellant could collect the required data, he was unable to take the information and prepare an articulable plan for himself or others to use. In addition, appellant would collect data that was not relevant to the particular situation. Although appellant was allowed to redo the required papers several times, he ultimately failed Nursing 4541 a second time.

Appellant appealed the second failure to Associate Dean Mary Wyers. In a letter dated January 9, 1985, she informed appellant that based on her review of the situation she could find no compelling evidence to support intervention.

Dean Pickard was the next person to review appellant's appeal of his grade. On January 10, 1985, she informed appellant that her review indicated no basis for recommending a change in the grade received by appellant.

Appendix B

W.A. Baker, Vice President for Academic Affairs, also reviewed appellant's appeal for a grade change. Based on his review of the appeal, discussions with Dean Pickard, and appellant's failure to present sufficient evidence of discrimination, differential treatment, or procedural irregularity, W.A. Baker denied appellant's appeal on January 11, 1985. On January 15, 1985, after considering the case, President W.H. Nedderman also denied the appeal.

On the same day, Vice President Baker denied appellant's request to enroll in courses for which Nursing 4541 was a prerequisite. On February 26, 1985, Dean Pickard informed appellant that since he had failed Nursing 4541 twice, he would not be eligible to graduate from the School of Nursing. On March 5, 1985, Dean Pickard denied appellant's request to take Nursing 4541 a third time at another school for transfer purposes.

James P. Duncan, Executive Vice Chancellor for Academic Affairs for The University of Texas System, also reviewed appellant's claims in response to letters appellant sent to members of the Board of Regents. In a letter dated July 22, 1985, James Duncan informed appellant that after reviewing appellant's contentions and discussing the case with personnel from the University, he found no error in the grades received or in the appellate procedure used to review the grades. The letter closed with the following: "Based upon the information available to me, which is summarized herein, I am convinced that you were accorded every available consideration with regard to your grade in Nursing 4541 2nd that there is no basis for pursuing this matter further."

On September 3, 1985, James Duncan sent another letter to appellant stating that The University of Texas System

Administration, and in particular the Office of the Chancellor and the Board of Regents, did not have an established procedure for reviewing grades received by a stud,student at one of the component universities. Citing his previous letter, James Duncan told appellant that as far as The University of Texas System was concerned, the matter was closed.

Appellant continued to seek review of his g grades. James L. Crowson, General Counsel for The University of Texas System, was the next person to respond to appellant. In a letter dated September 23, 1985, James Crowson again informed appellant that The University of Texas System considered the matter closed.

Finally, appellant sent a letter to Hans Mark, Chancellor of The University of Texas System. In a letter dated January 10, 1986, Chancellor Mark expressed his puzzlement at appellant's indication that he planned to name Chancellor Mark as a defendant in a lawsuit. Chancellor Mark stated in his letter that Francie Frederick from the Office of General Counsel had reviewed all of appellant's letters and other information and had advised Chancellor Mark that appellant had been afforded the full benefit of the University grade grievance procedure and had otherwise been treated fairly. In closing, Chancellor Mark informed appellant that it was not appropriate for him to intercede in the admissions process at the University nor to recommend that appellant be given permission to take Nursing 4541 for a third time at some other school.

After appellant's exhaustive attempts to have his grades changed or to be allowed to take the course a third time failed, appellant filed his lawsuit.

Appendix B

Appellant's Points of Error

Appellant's first point of error complains of the trial court's failure to submit written findings of fact and conclusions of law after they were requested by appellant. Both sides in this appeal have briefed the question of whether appellant's motion for review trial extended the time in which appellant could timely request findings of fact and conclusions of law. We need not address this point.

This is an appeal from a summary judgment. "Findings of fact and conclusions of law have no place in a summary judgment proceeding." *Starnes v. Holloway*, 779 S.W.2d 86, 90 (Tex.App.-Dallas 1989, writ denied); *see also, State v. Easley*, 404 S.W.2d 296, 297 (Tex. 1966) Appellant was not entitled to have any findings of fact or conclusions of law filed by the trial court. Appellant's first point of error is overruled.

Appellant's second point of error contends the trial court erred in granting appellees' motion for summary judgment because the court failed to recognize that federal and state law requires that a hearing is necessary regarding a student's grades at a public university.

In briefing this second point of error, appellant has provided a lengthy analysis of the following areas of law: (1) 42 U.S.C.S. § 1983 (Law. Co-op. 1986) cases in state court; (2) the availability of attorney's fees in section 1983 cases against state officials; and (3) the liability of state officials for acts not lawfully authorized.

While we do not necessarily disagree with appellant's presentation of the law concerning these subjects, we find that appellant has failed to present any authority relevant to his complaint on appeal. Since the appellant failed to present any

authority to maintain the point at issue, error, if any, has been waived. TEX. R. APP. P. 74(f). Appellant's second point of error is overruled.

Appellant's third point of error complains that the trial court erred in granting appellees' motion for summary judgment because the trial court failed to recognize appellant's due process rights. In this point of error, appellant presents arguments relating to substantive due process, procedural due process, and a contract claim.

In a summary judgment case, the issue on appeal is whether the movant met his burden for summary judgment by establishing that there exists no genuine issue of material fact and that he is entitled to judgment as a matter of law. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); TEX. R. CIV. P. 166a. The burden of proof is on the movant, and all doubts as to the existence of a genuine issue as to a material fact are resolved against him. *Great American R. Ins. Co. v. San Antonio Pl. Sup.. Co.*, 391 S.W.2d 41, 47 (Tex. 1965). Therefore, we must view the evidence in the light most favorable to the nonmovant. *See id.* In deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence will be disregarded and the evidence favorable to the nonmovant will be accepted as true. *Montgomery v. Kennedy*, 669 S.W.2d 309, 311 (Tex. 1984); *Farley v. Prudential Ins. Co.*, 480 S.W.2d 176, 178 (Tex. 1972). Every reasonable inference from the evidence must be indulged in favor of the nonmovant and any doubts resolved in his favor. *Montgomery*, 669 S.W.2d at 311. Evidence which favors the movant's position will not be considered unless it is uncontroverted. *Great American*, 391 S.W.2d at 47. If such uncontroverted evidence is from an interested witness, it cannot be considered as doing more than raising a fact issue, unless it is clear,

direct, positive, and free from inconsistencies and contradictions. Id.; see also Beaumont Enter..r & Journal v. Smith, 687 S.W.2d 729, 730 (Tex. 1985); Amer,Americana Motel, Inc. v. Johnson, 610 S.W.2d 143 (Tex. 1980) (per curiam) (affirming a summary judgment based solely upon the uncontroverted testimony of an interested party). The summary judgment will be affirmed only if the record establishes that the movant has conclusively proved all essential elements of his cause of action or defense as a matter of law. City of Houston, 589 S.W.2d at 678.

Appellant contends in his brief that his grade problems stem from several factors: (1) Elaine Gebhardt refused to accept a valid excuse for a class absence; (2) Gebhardt believed that appellant had made an obscene phone call to her; (3) Gebhardt refused to meet with appellant on six occasions to discuss his paper; and (4) arbitrary criteria was applied to the grading process. In addition to these problems, appellant points to several factors he claims existed which caused the appeals process to be deficient: (1) the review of appellant's work by Baxley and Grove was was done without appellant's knowledge or input; (2) appellant was not allowed to present evidence nor was any testimony elicited at his hearing with Dean Pickard; (3) administration officials had communications about appellant in appellant's absence; (4) there was no review of the subjective basis for appellant's grade; (5) appellant was not allowed to call witnesses; and (6) appellant was never actually given a "hearing".

Before reaching the substance of appellant's claims, we begin by setting out the appropriate standard of review in cases involving academic decisions. The Supreme Court of the United States has noted that "[c]ourts are particularly ill-equipped to evaluate academic performance" and warned against any judicial intrusion into academic decision making. *Bd. of Curators of University of*

Mo. v. Horowitz, 435 U.S. 78, 92, 98 8.Ct. 948, 956, 55 L.Ed.2d 124, 136 (1978). In the same opinion, Justice Powell remarked that "university faculties must have the widest range of discretion in making judgments as to the academic performance of students." Id. at 96 n.6, 98 S.Ct. at 958 n.6, 55 L.Ed.2d at 139 n.6 (Powell, J., concurring)

The decision of an individual professor as to the proper grade for a student in a particular course requires an expert evaluation of cumulative information and is not readily adapted to the tools of judicial decision making. *See id.* at 90, 98 S.Ct. at 955, 55 L.Ed.2d at 135. In *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985), the United States Supreme Court refined the "narrow avenue for judicial review" of academic decisions:

> When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Id. at 225, 106 S.Ct. at 513, 88 L.Ed.2d at 532 (footnote omitted). The Court cited to a lack of standards, a reluctance to "trench on the prerogatives" of educational institutions, and the Court's responsibility to safeguard academic freedom as reasons for the constrained review. *Id.* at 226, 106 S.Ct. at 514, 88 L.Ed.2d at 533. The Court concluded that courts are ill-suited to evaluate the substance of the multitude of academic decisions made on a daily basis by the faculty members of educational institutions. *See id.*

Appendix B

Due Process

We first address appellant's contention that there was a violation of his due process rights. Due process not only accords procedural safeguards to protected interests, but also protects substantive aspects of those same interests against impermissible governmental restrictions. *See Harrah Indep. School Dist. v. Martin*, 440 U.S. 194, 197, 99 S.Ct. 1062, 1063, 59 L.Ed.2d 248, 253 (1979)(per curiam).

We begin with the procedural due process question. Procedural due process requirements apply only to the deprivation of interests encompassed by the fourteenth amendment's protection of liberty and property. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548, 556 (1972); *see also Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 560 (Tex. 1985) (strictures of due process apply only to deprivation of interests protected by federal and state constitutions), appeal dismissed, 475 U.S. 1001 (1986). The range of interests granted this protection is not infinite. *Roth*, 408 U.S. at 570,92 S.Ct. at 2705,33 L.Ed.2d at 557. In determining whether due process requirement$ apply in the first place, this Court must look to the nature of the interest at stake to determine if the interest is within the constitution's protection of liberty and property. *See id.* at 57071, 92 S.Ct. at 2705-06, 33 L.Ed.2d at 557.

In the present case, appellant contends that he has a property right in his grades. Specifically, appellant contends that since the University created a catalogue and made it enforceable, appellant "clearly has property rights relative to the appeal process relative to his grades." As appellant has claimed no liberty interest, we will direct our attention only to his claimed property interest.

Appendix B

The procedural protection of property safeguards the security of interests that an individual has already acquired in specific benefits. *Id.* at 576, 92 S.Ct. at 2708, 33 L.Ed.2d at 560. In order to have a property interest in a benefit, the individual must have more than some abstract need or desire for that benefit. There must be more than a mere unilateral expectation to the benefit. Indeed, the individual must have a legitimate claim to the benefit. *Id.* at 577, 92 S.Ct. at 2709, 33 L.Ed.2d at 561. Property interests are not created by the Constitution. *See id.* A property interest must find an origin in an independent source, such as some aspect of state law. *See id.*; Stamos, 695 S.W.2d at 561.

As authority for his contention that he has a property interest in his grades, appellant cites this court to the case of *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). In *Ewing*, a university student brought suit against the regents of the university challenging the constitutionality of his dismissal from a program leading to a medical degree. *Id.* at 215, 106 S.Ct. at 508, 88 L.Ed.2d at 526. The student contended that he had a property interest in the program and his dismissal was arbitrary and capricious and resulted in a violation of his substantive due process rights. *Id.* at 217, 106 S.Ct. at 509, 88 L.Ed.2d at 527.

The Court first recognized their earlier opinion in *Horowitz* where they had assumed, without actually deciding, that courts can review an academic decision under a substantive due process standard. *Id.* at 222, 106 S.Ct. at 511, 88 L.Ed.2d at 530 The Court went on to recognize Justice Brandeis' admonition that they should not formulate any rule of constitutional law broader than was required given the facts of the case to which the rule was to be applied. *Id.* at 222, 106 S.Ct. at 512, 88 L.Ed.2d at 530 (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct.

466, 483, 80 L.Ed. 688, 711 (1935)). The Court decided that the facts of the case before them afforded a basis for decision that did not require them to decide whether the student did in fact have a property right in continued enrollment. *See id.* at 222-23, 106 S.Ct. at 512, 88 L.Ed.2d at 530-31.

> We therefore accept the University's invitation to "assume the existence of a constitutionally protectible property right in [Ewing's] continued enrollment," and hold that even if Ewing's assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action.

Id. at 223, 106 S. Ct. at 512, 88 L. Ed. 2d at 530-31 (footnoted omitted).

The *Ewing* decision does not stand for the proposition that appellant does in fact have a property interest in his grade or in the appeal process relative to grade grievances. As Justice Powell pointed out, Ewing's claim to a property right was dubious at best. *Id.* at 229, 106 S.Ct. at 515, 88 L.Ed.2d at 534 (Powell, J., concurring).

As did the Court in *Ewing*, we find that the facts of the present case afford the most appropriate basis for our decision. Although we have serious doubts as to a constitutionally protectible property right in a grade or in a grade grievance procedure, we need not decide that issue in this case. Even assuming that appellant had a protectible property right that gave rise to procedural rights under the due process clause, the facts in the present case show that appellant was afforded adequate procedural due process.

Appendix B

Appellant argues that he was denied adequate procedural due process because he was not provided with a full hearing. The Supreme Court has stated that before a person is deprived of a protected interest, due process requires that the individual be given notice and the opportunity for *some kind* of hearing appropriate to the nature of the case. *See Roth*, 408 U.S. at 570 n.7, 92 S.Ct. at 2705 n.7, 33 L.Ed.2d at 556 n.7 (emphasis added). In *Horowitz*, a case involving the dismissal of a student for academic reasons, the Supreme Court noted that in a case involving the suspension of a student for disciplinary reasons, they had held that the student wAs only entitled to an "informal give-and-take' between the student and the administration that gave the student the opportunity to explain his conduct. *Horowitz*, 435 U.S. at 86, 98 S.Ct. at 953, 55 L.Ed. 2d at 132. Recognizing that the nature of due process negates any inflexible procedures applicable to any situation and the significant difference between the failure of a student to meet academic standards and the violation of rules of conduct by a student, the Supreme Court held that in the case of a dismissal for academic reasons, a hearing is not required by the due process clause. *Id.* at 86 n.3, 98 S.Ct. at 953 n.3, 55 L.Ed.2d at 133 n.3.

We believe that the framework of the grading process is entitled to no more strict procedural requirements than the dismissal of a student for academic reasons. Therefore, appellant was not entitled to a hearing. We also disagree with appellant that the University catalog required that he be give a hearing. All the catalog provides for is a grievance review through defined academic channels, if evidence warrants an appeal.

In the instant case, appellant was warned during the semester that failure to finish the nursing process requirement would result in failure of the course. Appellant's work was reviewed by two independent instructors, both of whom recommended a failing

grade. Appellant appealed his case to the Dean of the School of Nursing. At that meeting, appellant was allowed to explain his side of the situation. Dean Pickard also considered a second request to reconsider appellant's grade. Appellant then took his case before the Vice President for Academic Affairs, W.A. Baker. Finally, appellant appealed his grade to W.H. Nedderman, President of the University. Based on his review of appellant's documentation and interviews, President Nedderman denied appellant's appeal. President Nedderman also denied a request to reconsider. Appellant enrolled in the courst a second time with a different instructor. However, he again received a failing grade Appellant appealed the second failure to Associate Dean Mary Wyers, Dean Pickard, W.A. Baker, and W.H. Nedderman. Every individual denied appellant's appeal after review of his complaint. Appellant then went beyond the steps outlined in the grievance procedure in the University catalog and contacted various members of The University of Texas System. James P. Duncan, Executive Vice Chancellor reviewed appellant's claims and conducted an investigation. Based on this review, he also denied appellant's appeal. James L. Crowson, General Counsel, informed appellant that the matter was considered closed after review. Finally, Chancellor Hans Mark reviewed appellant's case. Pursuant to his review, he informed appellant that it was not appropriate for him to intercede in University affairs.

We conclude that under the Supreme Court standards discussed above, appellant was afforded adequate procedural due process throughout his conflict with the University and the Nursing School. In addition, appellant was afforded every opportunity to take advantage of the University's grade grievance procedure. In fact, appellant was allowed to go beyond the scope of the grievance procedure.

Appendix B

We next examine appellant's claim that his substantive due process rights were violated. Again, examination of this question is strictly limited by the applicable standard of review. *See Ewing*, 474 U.S. at 227, 106 S.Ct. at 514, 88 L.Ed.2d at 533.

Substantive due process protection in the academic arena protects an individual from actions that are arbitrary and capricious. *See Horowitz*, 435 U.S. at 91-92, 98 S.Ct. at 956, 55 L.Ed.2d at 136. The United States Supreme Court has only assumed that courts even have the right to review academic decisions under a substantive due process standard. Id.; *see also Ewing*, 474 U.S. at 222, 106 S.Ct. at 511, 88 L.Ed.2d at 530.

Under the mandate of *Ewing*, a judge may not override the faculty's professional judgment in academic affairs unless "it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise fprofessional judgment. *Id.* at 225, 106 S.Ct. at 513, 88 L.Ed.2d at 532. Decisions since *Ewing* have followed this mandate. Where a reviewing court has found minimum evidence of "professional judgment," such evidence has been considered sufficient to justify judgment against a student as a matter of law. *See, e.g., Levi v. University of Texas at San Antonio*, 840 F.2d 277, 280 (5th Cir. 1988); *Clements v. Nassau County*, 835 F.2d 1000, 1004-05 (2d Cir. 1987) (in cases involving academic decisions, university is entitled to summary judgment if evidence exists to show rational basis for decision).

Thus, given the narrow and restrained review of academic decisions, a court must review the record for some evidence that professional judgment was exercised. If any evidence exists that there was some rational academic basis for the complained of decision, the substantive due process inquiry ceases. Given the facts in the present case, we cannot say that the decision to fail

appellant was such a substantial departure from accepted academic norms as to conclusively demonstrate that no professional judgment was exercised . Under *Ewing*, the trial court was not authorized to override the university officials' professional judgment, nor are we.

Given our analysis of appellant's due process argument and the applicable case guidelines, we hold that appellant's due process rights were not violated by the appellees.

Contract Claim

Appellant also contends in the third point of error that the trial court erred in granting summary judgment because the University catalog constituted a contract between the University and appellant. Specifically, appellant claims that said contract gave him certain rights that were not provided by appellees.

Appellant cites the case of *University of Tex. Health Sci. Ctr.* v. *Babb*, 646 S.W.2d 502 (Tex.App.-Houston [1 st Dist.] 1982, no writ) as authority for his position. In *Babb*, the Houston court stated that the university's catalog "constitutes a written contract between the educational institution and the [student], where entrance is had under its terms." *Id.* at 506.

Like the court in *Eiland v. Wolf*, 764 S.W.2d 827, 838 (Tex.App.-Houston [1 st Dist.] 1989, writ denied), we also find the *Babb* case to be distinguishable. In *Babb*, there was an express statement contained in the school catalog that allowed a student who started school under the terms of a specific catalog to continue through his program under the same catalog. *Babb*, 646 S.W.2d at 506. The court held that the student was entitled to rely on the terms of the catalog. *Id.*

In the instant case, however, the catalog contains the express notice that "[t]he provisions of this catalog do not constitute a contract, express or implied, between any applicant, student, or faculty member and The University of Texas at Arlington or The University of Texas System."

We do not have to decide the issue of whether, as a rule, the catalog of a state university constitutes a contract between the student and the university. In light of the express disclaimer in the document alleged to be a contract, no enforceable contract existed in the present case. Since a basic requirement of a contract is the intent to be bound, the catalog's express language negates, as a matter of law, the inference of any such intent on the part of the University. *See Wolf,* 764 S.W.2d at 838.

Even if the catalog did in fact constitute a contract with appellant, the record herein demonstrates that appellees complied with the terms and conditions of the catalog applicable in the instant case. The catalog specifically provides for a grade grievance procedure through a specified academic chain of individuals. The catalog states that a grade may be changed if "compelling evidence shows discrimination, differential treatment, or procedural irregularities." The record shows that throughout the course of the grade grievance process, each level of review was performed within the authority and guidelines of the school catalog.

In light of the record before us and our analysis of applicable authority, we find that the trial court did not err in granting summary judgment for appellees. Appellant's third point of error is overruled.

Appendix B

The judgment of the trial court is affirmed.

s/ Hal M. Lattimore
HAL M. LATTIMORE
JUSTICE

PANEL A
FARRIS, LATTIMORE, AND MEYERS, JJ.
DO NOT PUBLISH
TEX. R. APP. P. 90(C)

DEC 1 1 !991

APPENDIX C — DENIAL OF WRIT OF ERROR TO THE SUPREME COURT OF TEXAS DATED JULY 1, 1992

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

July 1, 1992

Mr. Douglas R. Larson
3939 Highway 80, Suite
Mesquite, TX 75150

Ms. Lydia Kimb le-Wright
Office of the Attorney General
Dan Morales, A.G.
P.O. Box 12548
Austin, TX 78711

Mr. Joe Bridges
Assistant Attorney Gener al
Hon. Dan Morales, A.G.
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548

RE: Case No. D-2101
Style: RICHARD TOBIAS v. THE UNIVERSITY OF TEXAS AT ARLINGTON, W.H. NEDDERMAN, MYRNA PICKARD, and ELAINE GEBHARDT

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Appendix C

Sincerely,

JOHN T. ADAMS, Clerk

by s/ Courtland Crocker
Courtland Crocker, Deputy

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
DEC 2 1992
OFFICE OF THE CLERK

NO. 92-574

* * * * * * * * * * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

* * * * * * * * *

RICHARD TOBIAS,
Petitioner,

vs.

THE UNIVERSITY OF TEXAS AT ARLINGTON,
W. H. NEDDERMAN, MYRNA PICKARD,
and ELAINE GEBHARDT,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS
AND/OR THE COURT OF APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant
Attorney General

MARY F. KELLER
Deputy Attorney General
for Litigation

JORGE VEGA
Chief, General
Litigation Division

LYDIA KIMBLE-WRIGHT
Assistant Attorney General
OF COUNSEL

J.D. HOOPER
Assistant Attorney General
COUNSEL OF RECORD

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 440-4550

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a student's grade is a recognizable interest protected by the due process clause of the Fourteenth Amendment of the United States Constitution.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENT FOR DENIAL OF THE WRIT 5

I. This Court should deny certiorari because Petitioner has failed to show that he had a property right that was taken without due process of law. ... 5

II. This court should deny certiorari because, even if Petitioner had a property right in a grade, all due process requirements were met. ... 7

A. Procedural Due Process 8

B. Substantive Due Process 9

CONCLUSION 10

APPENDIX A
Excerpts from the Undergraduate Catalog of the University of Texas at Arlington, Vol. LXVI, No. 3 12

TABLE OF AUTHORITIES

PAGE

CASES CITED:

Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) 6, 7, 8

Eiland v. Wolf, 764 S.W.2d 827 (Tex.App.--Houston [1st Dist.] 1989, writ denied) 8

Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) 5, 8

Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) 9

Regents of the University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) 5, 6, 9

Tobias v. University of Texas et al., 824 S.W.2d 201 (Tex.App.--Fort Worth 1991, writ denied) 5, 6, 7, 8, 9

University of Texas Health Science Center v. Babb, 646 S.W.2d 502 (Tex. App.--Houston [1st Dist.] 1982, no writ) 6

PAGE

STATUTES CITED:

42 U.S.C. § 1983 1

UNITED STATES CONSTITUTION CITED:

Fourteenth Amendment 1, 5, 7

NO. 92-574

* * * * * * * * * * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

* * * * * * * * *

RICHARD TOBIAS,

Petitioner,

vs.

THE UNIVERSITY OF TEXAS AT ARLINGTON,
W. H. NEDDERMAN, MYRNA PICKARD,
and ELAINE GEBHARDT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS
AND/OR THE COURT OF APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions involved are: The United States Constitution, Fourteenth Amendment; and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

In the Spring of 1982, Petitioner enrolled at the University of Texas at Arlington, seeking an undergraduate degree in nursing. During the Spring of 1984, Petitioner took Obstetric Nursing (Nursing 4541) from Professor Elaine Gebhardt. At the beginning of the semester, Professor

Gebhardt spent a great deal of time explaining what a process paper was, and answering Petitioner's questions about the process papers that would be required during the semester. Throughout the semester, Professor Gebhardt met with Petitioner at least weekly, answering questions and giving him extra help. Despite the extra meetings, Petitioner was incapable of putting data together in a framework. Additionally, despite time extensions given to him, Petitioner could not write a process paper although all the other students were capable of it.

The very last day the process papers were due, Petitioner brought a stack of copied notes, charts, and medical records into Professors Gebhardt's office. The papers represented data he had gathered, but he still had no completed nursing process. Petitioner told Professor Gebhardt that he wanted her to write the paper. Professor Gebhardt felt Petitioner deserved a failing grade, but gave his work to another instructor, Susan Baxley, for a second opinion. Doctor Wires, Professor Gebhardt's supervisor, recommended the papers be given to Dr. Susan Grove for another unbiased opinion. Both of the outside reviewers recommended a failing grade.

Following Petitioner's failure of Nursing 4541, Dean Myrna Pickard reviewed Petitioner's complaint. She held conferences with him regarding his grade, and he presented his views on the situation to her. She also contacted nurses and fellow students of Petitioner at the obstetrical unit where he did his clinical to question them about any discrimination toward Petitioner. She found no evidence to substantiate his story. Finally, Dean Pickard herself reviewed the papers Petitioner turned in and agreed that she too would have failed a student who turned in work of such poor quality. Such being the case, she denied his appeal.

Dean Pickard then denied Petitioner's request to reconsider and his request for a waiver of regulations to take courses out of sequence.

Vice-President for Academic Affairs William Baker then reviewed Petitioner's appeal from the denial of a grade change. Vice-President Baker did not "find any substantive

evidence of discrimination, differential treatment or procedural irregularities" and, consequently, denied Petitioner's appeal. He also denied Petitioner's request for a waiver of regulations.

Next, President Nedderman considered Petitioner's appeal from denial of a grade change and, after reviewing his case, denied his appeal. Following a meeting with Petitioner regarding the situation, President Nedderman found that Petitioner's appeal had been given adequate consideration and denied his request to reconsider.

Petitioner then took Nursing 4541 from Susan Baxley in the Fall of 1984. Ms. Baxley noticed during the semester that Petitioner had trouble with the assessment of a patient's situation, and with actually carrying out the care of a patient without supervision. Ms. Baxley also found out that Petitioner had difficulty communicating with patients in labor and supporting patients.

Ms. Baxley also found that Petitioner had a lot of trouble doing a nursing process. He could not assimilate the data he gathered into a plan that would articulate the process of caring for the patient. Some of the data Petitioner would collect was either not relevant to the patient, or not necessary for the particular problem. Finally, the papers Petitioner turned in were below a passing level, even though he had been allowed to redo them several times. Consequently, Petitioner failed Nursing 4541 a second time.

Petitioner then appealed to Associate Dean Mary Ellen Wyers, who found no reason to change his grade.

Petitioner's appeal was then heard by Dean Pickard. She met with Petitioner, met with the individuals involved, and reviewed the papers Petitioner had submitted to her, but found no reason to recommend a grade change.

Next, Vice-President Baker considered his appeal but found no evidence warranting a change in grade. Likewise, President Nedderman considered, but denied, Petitioner's appeal.

Vice-President Baker then heard a second request for a waiver of regulations in order to take courses for which Nursing 4541 is a prerequisite, and again denied this request.

Also, Dean Myrna Pickard again informed Petitioner she would not allow him to take his courses out of sequence.

Dean Pickard next heard Petitioner's request that regulations be waived in order to allow him to take the twice-failed course at another university, and then transfer the credit for it to the University of Texas at Arlington. Dean Pickard refused to allow this.

The University of Texas System Executive Vice Chancellor, James P. Duncan, granted Petitioner's appeal a discretionary review. After investigation, Vice Chancellor Duncan found "no error" in Petitioner's grades nor in the review Petitioner's appeal had received.

Petitioner then made an inquiry to the Board of Regents which was answered by the University of Texas System General Counsel, James L. Crawson. Mr. Crawson informed Petitioner that the University of Texas System Administration considered the matter closed.

Finally, University of Texas System Chancellor Hans Mark granted Petitioner's appeal discretionary review. After examining Petitioner's record, Chancellor Mark found that his appeal had been reviewed at every appropriate level.

On August 31, 1984, President W. H. Nedderman gave Petitioner his final decision and denied Petitioner's appeal.

REASONS FOR DENYING THE WRIT
ARGUMENT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE PETITIONER HAS FAILED TO SHOW THAT HE HAD A PROPERTY RIGHT[1] THAT WAS TAKEN WITHOUT DUE PROCESS OF LAW.

Petitioner claims that a property interest in a grade at the University of Texas at Arlington was taken without due process of law. Nevertheless, any discussion about alleged due process violations are premature. As the Texas Court of Appeals properly reeognized in its discussion of due process, "[t]he procedural protection of property safeguards the security of interests that an individual has already acquired in specific benefits." *Tobias v. University of Texas et al.*, 824 S.W.2d 201, 208 (Tex.App.--Fort Worth 1991, writ denied). In order to have a property interest in a benefit, the individual must have more than some abstract need or desire for that benefit. *Id.* There must be more than a mere unilateral expectation to the benefit. *Id.* Indeed, the individual must have a legitimate claim to the benefit. *Id* at 577. Nevertheless, Petitioner must also show entitlement to the benefit which he claims.

Petitioner confuses the nature of the property right protectible by the Fourteenth Amendment. Apparently, Petitioner argues that since Texas statutes require licensure of all nursing professionals, the education required to obtain that license automatically enjoys Fourteenth Amendment protection. Although Respondents do not dispute Petitioner's right to a public education, *see Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975), Respondents find no support for Petitioner's alleged entitlement to a grade.

---

[1]Petitioner's claim that he has a property interest in a grade should be distinguished from a property interest in his public education. Petitioner is not raising such a claim.

As Justice White recognized in *Goss*, "[p]rotected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Id.* at 735. Petitioner appears to suggest that *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) supports his claim that he enjoys a property right in a grade. Petition for Writ of Certiorari, at 12. Petitioner's reliance on *Ewing* in asserting a property right in a grade is misguided; nevertheless, it is true that a discussion of *Ewing* is crucial to whether Petition has a property right.

Ewing involved a university student who brought suit against the University of Michigan Board of Regents challenging the constitutionality of his dismissal from a medical school program. *Ewing*, 474 U.S. at 215, 106 S.Ct. at 508. The student asserted that he had a property interest in the program and that his dismissal was arbitrary and capricious, *Ewing*, 474 U.S. at 217, 106 S.Ct. at 509; that is, a substantive due process challenge. This Court, for reasons discussed more fully *infra*, failed to find any deprivation of the student's substantive due process rights. In arriving at its decision that no due process rights were violated, the Court merely "accept[ed] the University's invitation to 'assume the existence of a constitutionally protectible property right in ... continued enrollment.'" *Ewing*, 474 U.S. at 223, 106 S.Ct. at 512. The Court made no broad pronouncement that the plaintiff had a property right in a grade. Simply put, Petitioner has construed *Ewing* to represent a proposition which clearly does not exist after a more than cursory reading of this Court's decision.

Petitioner also attempts to base his property right claim on the University catalog. The Court of Appeals properly found that no contract existed between Petitioner and the University of Texas at Arlington. *Tobias* at 211. Nevertheless, Petitioner maintains that the Court erred in distinguishing the instant case from *University of Texas Health Science Center v. Babb*, 646 S.W.2d 502 (Tex.App.--Houston [1st Dist.] 1982, no writ), which held that a contract existed

between the plaintiff and the defendant university.

Yet, whether the court erred or not is immaterial to the issue before this Court. The *Babb* court, like the *Tobias* court, was interpreting state law, not federal law. The Supreme Court has no interest in second-guessing state courts on state law; that is, unless the state court violates federal law.

The ramifications of this Court extending constitutional protection to a student's grade would be astounding. Federal courts, already overburdened and understaffed, would be inundated with complaints from students unsatisfied with their grades. Federal judges would be expected to give "an expert evaluation of cumulative information [that] is not readily adapt[able] to the procedural tools of judicial...decision making." *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). As this Court declined in *Horowitz* "to further enlarge the judicial preserve in the academic community," it should do so here as well. *Id.* It is unnecessary for this Court to consider whether there was any due process violation, as Petitioner had no recognizable property right protectible by the Fourteenth Amendment to the U.S. Constitution.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE, EVEN IF PETITIONER HAD A PROPERTY RIGHT IN A GRADE, ALL DUE PROCESS REQUIREMENTS WERE MET.

The Texas Court of Appeals properly applied Supreme Court precedent regarding substantive and procedural due process. In doing so, the Court held "that [Petitioner's] due process rights were not violated by [Respondents]." *Tobias* at 210. Notwithstanding the Court's determination, Petitioner continues to maintain a violation of his procedural and substantive due process rights in the denial of a full hearing regarding a grade. Petitioner's claims are meritless.

A. Procedural Due Process

Petitioner is not entitled, under procedural due process, to a hearing in order to review an academic dismissal. *Horowitz,* 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). Thus, the same rational can be applied to the procedural due process required to review a student's grade. In fact, the stronger evidence suggests that no hearing is required.

In *Horowitz*, this Court determined the due process necessary in the academic dismissal context. As stated *supra*, the Court stated that no hearing was necessary in academic dismissal cases. In arriving at this decision, the Court analogized academic dismissals to "the decision of an individual professor as to the proper grade for a student in his course", *Horowitz* at 955, and suggested that neither are adaptable to the fact finding processes of the courts. *Id.* Thus, no hearing is necessary regarding a student's grade.

Even if Petitioner is found to be entitled to a hearing, Petitioner is entitled to "a far less stringent procedural requirement" for an academic dismissal than for a disciplinary dismissal. *Horowitz*, 435 U.S. at 86, 98 S.Ct. at 953. All that is required for a disciplinary review is an "informal give-and-take" between the student and the administrative body, to give the student "the opportunity to characterize his conduct and put it in what he deems the proper context." *Horowitz*, 435 U.S. at 86, 98 S.Ct. at 953, citing *Goss*, 419 U.S. at 584, 95 S.Ct. at 741. A disciplinary dismissal requires that the student be given oral or written notice of the charges and evidence against him, and the opportunity to present his side of the story. *Eiland v. Wolf*, 764 S.W.2d 827, 833 (Tex.App.--Houston [1st Dist.] 1989, writ denied), citing *Goss*, 419 U.S. at 581, 95 S.Ct. at 739. Petitioner received this. Petitioner is entitled to no more than notice and an opportunity to be heard.

Beyond meeting the above procedural due process requirements, the university cooperated in reviewing Petitioner's appeal at levels far beyond those specified in the university catalog. Petitioner's appeal of his academic record

reached beyond the President's office, as specified in the university catalog, and to the Vice Chancellor for Academic Affairs for the University of Texas System, the Office of General Counsel for the University of Texas System, and to the Chancellor of the University of Texas System. Allowing Petitioner such an extensive appeal went "beyond the scope of the grievance procedure" and any constitutional due process protection. *Tobias* at 210.

Petitioner contends that he was not afforded a proper hearing because no sworn testimony or other admissible evidence was taken during the appeal process, and because he was not afforded the opportunity of cross-examination or any other form of confrontation. This Court, in *Horowitz*, rejected the argument that "the fundamental safeguards of representation by counsel, confrontation, and cross-examination of witnesses" apply in review of academic dismissals. *Horowitz*, 435 U.S. at 86 n.2, 98 S.Ct at 953 n.2. Other courts have also found that the "presence of attorneys or the imposition of rigid rules of cross-examination at a hearing, would serve no useful purpose, notwithstanding that the dismissal in question may be of permanent duration." *Greenhill v. Bailey*, 519 F.2d 5, 9 (8th Cir. 1975). Petitioner's due process rights have not been violated, as he was afforded both notice and an opportunity to be heard. Petitioner received even more consideration than he was due.

B. Substantive Due Process

As the Court of Appeals properly recognized, "[s]ubstantive due process protection in the academic arena protects an individual from actions that are arbitrary and capricious." *Tobias* at 210. To be sure, Petitioner alleges that the grade of "F" he received on the nursing process was due to arbitrary and capricious action on the part of Respondent Gebhardt. Thus Petitioner asserts a constitutionally protected interest in a grade...that is, a passing grade.

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should

show great respect for the faculty's professional judgment. *Ewing*, 474 U.S. at 225, 106 S.Ct. at 513. Moreover, as this Court has stated, "they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not [] exercise professional judgment." *Id.* In keeping with the spirit of this Court in *Ewing*, the Texas Court of Appeals held that:

> Given the facts in the present case, we cannot say that the decision to fail appellant was such a departure from accepted academic norms as to conclusively demonstrate that no professional judgment was exercised. Under *Ewing*, the trial court was not authorized to override the university officials' professional judgment, nor are we.

Tobias at 211.

CONCLUSION

Petitioner has not provided this Court with any "special and important reasons" for granting his petition for writ of certiorari. Petitioner suggests only that Texas appeals courts are in conflict regarding state law, not that any United States Courts of Appeal have come to conflicting positions. As this case poses no important issues of federal law, the petition for writ of certiorari should be denied.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General for
Litigation

JORGE VEGA, Chief
General Litigation Division

LYDIA KIMBLE-WRIGHT
Assistant Attorney General
OF COUNSEL

J. D. HOOPER
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 440-4550
COUNSEL OF RECORD

APPENDIX A

Excerpts from the Undergraduate Catalog of the University of Texas at Arlington, Vol. LXVI, No. 3

No Contract:

"The provisions of this catalog do not constitute a contract, express or implied, between any applicant, student, or faculty member and The University of Texas at Arlington or The University of Texas System."

Grievance Related to Grades:

"Individual course instructors retain primary responsibility for assigning grades. The instructor's judgment is final unless compelling evidence shows discrimination, differential treatment, or procedural irregularities."

Repeat of Course Work:

"Nursing courses may be repeated if the earned grade in the course is below a C, but they may be repeated only one time."

Requirements for the Bachelor of Science Degree in Nursing:

"Satisfactory completion (C) of prerequisite courses is required prior to enrolling in courses in subsequent semesters."

Nursing 4581 Advanced Nursing Concepts:

"Prerequisite: NURS 4541."

Nursing 4671 Nursing Management:

"Prerequisite: NURS 4541."